Lim Tiong Huai v Wang Swee Teck (trading as Wang Plumbering & Electric Co)

HIGH COURT (MELAKA) — CIVIL APPEAL NO 1–12–19 OF 2003
LOW HOP BING J
4 DECEMBER 2003

Civil Procedure — Pleadings — Parties to action bound by own pleadings — Whether existed failure of consideration in pleadings — Whether court ought to decline an unpleaded issue

Civil Procedure — Summary judgment — Delay in application — Reasonable explanation given

Negotiable Instruments — Cheque — Dishonour of cheque — Parties to cheque — Whether party thereto for value and holder in due course — Bills of Exchange Act 1949 s 30

This is an appeal by the appellant/defendant ("the defendant") against the decision of the learned sessions court judge in entering summary judgment against the defendant under O 26A of the Subordinate Courts Rules 1980. The defendant was the drawer of six cheques dated between 28 June 1999 and 30 January 2000 in favour of the plaintiff. The plaintiff presented the same for payment on the respective due dates but all payments were stopped by the defendant. The defendant contended that there were triable issues based on failure of consideration and the defendant's request to the plaintiff to return the cheques to the defendant. The defendant also contended that there was delay on the part of the plaintiff in making the application. On the other hand, the plaintiff submitted that there were no triable issues and delay on the part of the plaintiff.

Held, affirming the decision of the sessions court and dismissing the appeal with costs:

(1) It is a fundamental principle of civil litigation that parties are bound by their own pleadings. A careful examination of the defence clearly showed that failure of consideration was never pleaded at all. Accordingly, the court must decline to decide on an unpleaded issue (see paras 10–11); *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 followed.

(2) It is trite law that a plaintiff is not precluded from taking out an application for summary judgment after the defence had been filed. However, in such a situation the onus of explaining the delay was on the plaintiff (see para 18).

(3) The defendant's signature appeared on all six cheques. Under s 30(i) of the Bills of Exchange Act 1949, the defendant is deemed to have become a party thereto for value. The plaintiff being a holder of the said cheques, is prima facie deemed under s 30(ii) of the Act to be a holder in due course. Based on its affidavits, the defendant had failed to rebut the prima facie presumption (see paras 14–15); *Ng Choh Leng v Loh Che Kwet* [2002] 1 CLJ 31 followed.

A [**Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu/defendan ('defendan tersebut') terhadap keputusan hakim mahkamah sesyen yang memasuki penghakiman terus terhadap defendan di bawah A 26A Kaedah-Kaedah Mahkamah Rendah 1980. Defendan adalah pengeluar enam keeping cek bertarikh di antara
B 28 Jun 1999 dan 30 Januari 2000 berpihak kepada plaintif. Plaintif telah mengemukakan cek-cek tersebut pada tarikh patut dibayar tetapi semua pembayaran telah diberhentikan oleh defendan. Defendan telah mengatakan bahawa terdapat isu-isu yang patut dibicarakan berdasarkan kegagalan balasan dan permintaan defendan kepada plaintif untuk memulangkan cek-cek tersebut kepada defendan. Defendan juga
C mengatakan bahawa terdapat kelewatan oleh plaintif dalam membuat permohonan tersebut. Pada sebaliknya, plaintif berhujah bahawa tidak terdapat sebarang isu yang patut dibicarakan dan tiada kelewatan oleh plaintif.

D **Diputuskan**, mengesahkan keputusan mahkamah sesyen dan menolak rayuan dengan kos:

(1) Adalah merupakan prinsip asas litigasi sivil bahawa pihak-pihak adalah terikat kepada pliding masing-masing. Suatu pemeriksaan pembelaan jelas menunjukkan bahawa kegagalan balasan tidak diplidkan sama sekali. Justeru itu, mahkamah tidak harus
E memutuskan atas satu isu yang tidak diplidkan (lihat perenggan-perenggan 10–11); *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 dan *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 diikut.

(2) Adalah merupakan undang-undang jelas bahawa seorang plaintif tidak dihalang daripada membuat suatu permohonan untuk
F penghakiman terus selepas pembelaan difailkan. Tetapi, dalam situasi tersebut beban untuk menjelaskan kelewatan adalah terletak pada plaintif (lihat perenggan 18).

(3) Tandatangan defendan terdapat di atas kesemua enam-enam cek. Di bawah s 30(i) Akta Bil Pertukaran 1949, defendan adalah dianggap
G sebagai telah menjadi satu pihak kepadanya untuk nilai. Plaintif yang merupakan pemegang cek-cek tersebut, adalah secara prima facie dianggap di bawah s 30(ii) Akta tersebut sebagai seorang pemegang mengikut perjalanan. Berdasarkan affidavit-afidavit, defendan telah gagal untuk menolak anggapan prima facie tersebut (lihat perenggan-perenggan 14–15); *Ng Choh Leng v Loh Che Kwet* [2002] 1 CLJ 31
H diikut.]

Notes

For cases on delay in application for summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5894–5923.

For cases on dishonour of cheques, see 10 *Mallal's Digest* (4th Ed, 2002
I Reissue) paras 763–764.

For cases on parties to action bound by own pleadings, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4624–4629.

Cases referred to

B-Trak Sdn Bhd v Bingkul Timber Agencies Sdn Bhd & Anor[1989] 1 MLJ 124 (refd)
Janagi v Ong Boon Boon Kiat [1971] 2 MLJ 196 (folld)
Chartered Bank, The v Yong Chan [1974] 1 MLJ 157 (folld)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300 (folld)
Ng Choh Leng v Loh Che Kwet [2002] 1 CLJ 31 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152 (folld)

Legislation referred to

Bills of Exchange Act 1949 s 30(i), (ii)
Subordinate Courts Rules 1980 O 26A r 2

Appeal from: Summons No (2) 52–606 of 2001 (Sessions Court, Melaka)

Sahrihnan bin Jani (Anandan Krishnan & Partners) for the appellant/defendant.
Wee Ai Yen (Ho & Co) for the respondent/plaintiff.

Low Hop Bing J:

Appeal

[1] This is an appeal by the appellant/defendant ('the defendant') against the decision of the learned sessions court judge who on 19 December 2002 entered summary judgment against the defendant under O 26A of the Subordinate Courts Rules 1980.

Facts of the case

[2] The facts herein are simple and straightforward, as the defendant was the drawer of six cheques dated between 28 June 1999 and 30 January 2000 in favour of the plaintiff who presented the same for payment on the respective due dates but all payments thereof were stopped by the defendant.

[3] Notices of demand were issued by the plaintiffs solicitors to the defendant on 15 December 1999 for RM75,000 and on 13 March 2000 for RM24,351.26. The defendant has failed, refused and neglected to pay these demanded sums.

[4] The statement of defence para 3 referred to a letter of award dated 29 October 1997 between Industri Mayatec Sdn Bhd and Wang Plumbering & Electric Co and averred that the defendant has requested the plaintiff to return the defendant' cheques as payment should be made by Industri Mayatec Sdn Bhd, but that the plaintiff has failed and neglected to do so, as a result of which the defendant has given the 'stop payment' instruction to his bank.

[5] Paragraphs 5 contain bare denials of the sum of RM75,000 and RM24,351.26 respectively.

[6] No other allegation of fact or defence was raised by the defendant.

Counsel's submissions and decision of the court

[7] Encik Sahrihan bin Jani, learned counsel for the defendant, raised the so-called triable issues based on failure of consideration and the defendant's request to the plaintiff to return the cheques to the defendant.

[8] In addition, the defendant also contended that there was delay on the part of the plaintiff in making the application for summary judgment.

[9] The essence of the submission by Cik Wee Ai Yen, learned counsel for the plaintiff, is that there is no triable issue nor was there any delay on the part of the plaintiff in the application for summary judgment. She cited, inter alia, s 30 of the Bills of Exchange Act 1949 in support thereof.

[10] In my judgment, it is a fundamental principle of civil litigation that parties are bound by their own pleadings: *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 (HC); *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152.

[11] A careful examination of the defence as adumbrated above clearly shows that failure of consideration has never been pleaded at all and I must decline to decide on this unpleaded issue.

[12] In *The Chartered Bank v Yong Chan* [1974] 1 MLJ 157, the trial judge had decided on an issue, ie breach of contract which was not raised in the pleadings which was based on libel. The judgment was set aside by the Federal Court and a new trial ordered.

[13] However, even by stretching my imagination to the fullest extent and to construe the said para 3 of the statement of defence as including the issue of 'failure of consideration', I am not persuaded that it is a triable issue, in the light of s 30 of the Bills of Exchange Act 1949 which reads as follows:

> 30 Presumption of value and good faith
>
> (i) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.
>
> (ii) Every holder of a bill is prima facie deemed to be a holder in due course: but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

[14] The defendant's signature appears on all the aforesaid six cheques and so under s 30(i), he is prima facie deemed to have become a party thereto for value. The plaintiff being a holder of the said cheques is under s 30(ii) prima facie deemed to be a holder in due course: see also *Ng Choh Leng v Loh Che Kwet* [2002] 1 CLJ 31 at pp 33 and 34.

[15] Having regard to the affidavits of the defendant, I am also not convinced that the defendant has succeeded in rebutting the aforesaid prima facie presumptions. What was pleaded in para 3 of the defence was actually based on privity of contract but there was no submission on this issue at all.

[16] *In National Company for foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, it was held by the then Supreme Court that once the plaintiff has fulfilled the preliminary requirements that the statement of claim has been served on the defendant who has entered an appearance (in this appeal, on 6 February 2002) and the plaintiffs affidavit in support of the application has complied with O 26A r 2 of the Subordinates Courts Rules 1980 (as is the case in the instant appeal), a prima facie case has been established by the plaintiff and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him: see *Ng Choh Leng*.

[17] I am unable to agree with the submission that the defendant's request for the plaintiff to return the cheques to the defendant is a triable issue.

[18] In respect of the defendant's third and final question based on the plaintiffs delay, it is pertinent to point out that the plaintiffs application for summary judgment was filed on 13 September 2002, ie about four months after the defence was filed on 6 May 2002. In my judgment, it is trite law that the plaintiff is not precluded from taking out an application for summary judgment after the defence was filed, but the onus of explaining the delay thereafter was on the plaintiff: see eg *B-Trak Sdn Bhd v Bingkul Timber Agencies Sdn Bhd & Anor* [1989] 1 MLJ 124.

[19] In the instant appeal, the plaintiff has explained that the parties herein were negotiating for an amicable settlement of the plaintiffs claim on the terms proposed by the defendant, resulting in the plaintiff not filing the said application so as not to prejudice the process for settlement. I accept this as a reasonable and probable cause of the delay, as a result of which, the plaintiff is not precluded from filing the O 26A application.

[20] Having regard to the submissions of the respective learned counsel, I am of the view that the learned sessions court judge was correct in giving summary judgment in favour of the plaintiff, which is hereby affirmed. Hence, the defendant's appeal is dismissed with costs.

Decision of the sessions court affirmed and appeal dismissed with costs.

Reported by Eugene Jayaraj